APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED MARCH 27, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 00-2945

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

REGINALD PALMER,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 3:99-30228-01-GPM —
G. Patrick Murphy, *Chief Judge.*

ARGUED MARCH 7, 2001 — DECIDED MARCH 27, 2001*

Before DIANE P. WOOD, EVANS, and WILLIAMS, *Circuit Judges.*

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* This appeal was originally resolved in an unpublished order of March 27, 2001. Subsequently, we granted a request to convert the order to a published opinion.

Appendix A

PER CURIAM. Reginald Palmer was convicted on three counts of distributing crack within 1,000 feet of a playground. He appeals, challenging only the very lengthy prison sentence — 475 months — he received.

In May and June 1998, Palmer sold small amounts (.9 grams, and 1.9 grams twice) of crack to Keenan Deal who was — much to Palmer's later surprise — cooperating with authorities. The sales occurred within 1,000 feet of Virginia Park, an East St. Louis, Illinois, playground. A superseding indictment charged Palmer with three counts of distributing crack, 21 U.S.C. § 841(a)(1), and three parallel counts of doing the deals within 1,000 feet of a playground, *id.* § 860(a). Palmer entered guilty pleas to all six counts without a plea agreement, but because the distribution counts were lesser-included offenses of the more serious "playground" counts, *see Williams v. United States*, 150 F.3d 639 (7th Cir. 1998), the district court entered judgment only on the latter.

In preparing the presentence investigation report (PSR), the probation officer calculated Palmer's relevant conduct using information from Deal and from federal agents who interviewed several sources, including Palmer's former neighbor, Robert Branscomb, and Warren Griffin, a "governor" of the Gangster Disciples gang. The probation officer concluded that Palmer's relevant conduct totaled 353 grams[1] of crack: 98 grams from Deal, 14 grams from Branscomb, and 241 grams from Griffin. Palmer objected but, for the most part, provided only conclusory responses

1. We have rounded the amounts off.

denying certain transactions or objecting to particular witness statements. He did, however, specifically object to any drugs involving Griffin, arguing that those activities were unreliable and too remote in time to be included in his relevant conduct under the sentencing guidelines.

At the sentencing hearing, Deal described five previous occasions when he bought 1.7 grams of crack from Palmer. He also testified about several more ounces of crack he saw Palmer carrying during those transactions. Branscomb testified that Palmer sold crack outside Branscomb's home "about every day during the year of 1998 and 1999." Finally, the government called a deputy U.S. marshal who had previously interviewed Griffin about his contacts with Palmer during 1996. Griffin, according to the marshal, had "taught [Palmer] the drug trade." Griffin allegedly told the marshal he received two ounces of crack from Palmer and had seen him in possession of seven or eight ounces of crack that Palmer and a friend had cooked from powder.

Palmer offered no direct evidence to support his objections to the PSR. He did, however, argue that a substantial portion of the relevant conduct amount, particularly the quantity attributable to him by reason of Griffin's statements, was based on hearsay and should not be included in the final calculation. Palmer suggested that the total amount of crack was only 135 grams, not 353.2, although it is unclear how he arrived at this calculation. The district judge determined:

> There is a substantial, rational basis for attributing more than 150 grams to the defendant. Now, the

> Government has an exact 353.2 grams. I am not prepared to say that they are exactly correct, but I am prepared to say that there is substantially more than 150 grams that must be attributed to the defendant under the evidence that is before me.

We review for clear error the district court's calculation of the drug quantity attributed to Palmer as relevant conduct. *United States v. Huerta*, 239 F.3d 865, 875 (7th Cir. 2001). In doing so, we refrain from second-guessing the district judge, *United States v. McEntire*, 153 F.3d 424, 431 (7th Cir. 1998), and must affirm unless we are left with a "definite and firm conviction that a mistake has been committed," *Huerta*, 239 F.3d at 875 (internal quotations and citation omitted).

Palmer first argues that the district court failed to make a specific finding of drug quantity; the judge's determination of "more than 150 grams" is legally insufficient, Palmer suggests. The government argues that Palmer forfeited this argument, and others, by failing to properly object at sentencing, and accordingly our review should only be for plain error. *See* Fed. R. Crim. P. 52(b); *United States v. Krankel*, 164 F.3d 1046, 1055 n.3 (7th Cir. 1998). We reject this argument and find the defendant's objections adequate to trigger clear error, rather than plain error, review.

Recognizing the importance of drug quantity in sentencing, we require that a sentencing court make an explicit drug-quantity finding and explain how it arrived at the sentence. *McEntire*, 153 F.3d at 435. The district court here specified only "more than 150 grams," but a more exact

sum was not necessary given that anything between 150 and 500 grams would have resulted in the same sentencing range. But is the "more than 150 grams" finding supportable?

This case presents a situation we have been encountering with increased regularity. A defendant pleads guilty to dealing in small amounts of crack — here, Palmer sold only a total of 4.7 grams to Deal in the three transactions specifically charged in the indictment — but then the presentence report lists huge amounts of crack as "relevant conduct," which dramatically ratchet up the resting point on the sentencing guideline grid. We conclude here that the 98 grams attributed to Palmer through Deal and the 14 grams attributed to him through Branscomb, though dwarfing the amounts involved in the actual sales, are supportable based on our review of this record. But we have serious misgivings about the huge amount, 241 grams, piled on Palmer through a U.S. marshal's recitation of a statement given to him by Griffin, who did not personally testify (he took the Fifth) at the sentencing hearing. Our doubts about Griffin's evidence, inaccurately presented to us by the government as Griffin's "testimony," gives us great pause even if only a portion of it is needed to move Palmer over 150 grams. First, the matters related by Griffin are remote in time — over 2 years old — to the sales to Deal that form the basis for the counts of conviction. Second, the district court did not make any specific findings as to Griffin's reliability, which probably is understandable given the fact that the way his "evidence" was presented affords no basis for determining that what he told the marshal was true or accurate.

Accordingly, given our serious concerns about the Griffin evidence, we determine that a finding of "more than 150 grams" on the basis of this record is clearly erroneous. The record, however, does support, for relevant conduct purposes, a sentence within the range of 50 to 150 grams of crack. Accordingly, the sentence is VACATED and the case REMANDED to the district court for resentencing. At resentencing, no further proceedings will be necessary, other than an adjustment of the sentence, if the district court elects to sentence Palmer on the basis of 50 to 150 grams. To go beyond that level, more proceedings regarding Griffin and a better record on the reliability of the information he offered will be required.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — EXCERPTS FROM TRANSCRIPT OF SENTENCING OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS DATED JULY 24, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 99-30228

UNITED STATES OF AMERICA,

Plaintiff,

vs.

REGINALD PALMER,

Defendant.

July 24, 2000

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE G. PATRICK MURPHY
UNITED STATES DISTRICT JUDGE

* * *

[10] . . . you received four years probation?

A Yes, I did.

Q And as part of that probation were you ordered to undergo drug treatment?

A Yes, I did.

Q Do you have a 1997 conviction for burglary to a motor vehicle?

A Yes, I do.

Q And for that conviction were you sent to the Illinois State Penitentiary.

A Yes.

Q And, Mr. Deal, do you have a 1998 conviction for theft over $300?

A Yes.

Q And for that conviction were you also sentenced to a term of imprisonment?

A Yes.

Q Are you currently on parole?

A Yes.

Q And have you been promised anything for your testimony here today?

A No.

Q In the course of this investigation, Mr. Deal, did you agree to make some, what we call controlled purchases of crack cocaine from your cousin, Reginald Palmer?

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[11] A Yes.

Q And for your services were you paid?

A Yes.

Q Were you provided gas, for example, gas to get to and from where you need to be?

A Yes.

Q And witness fees?

A Yes.

Q And do you recall that the total amount of payments you received in the course of this case to be about $525?

A Yes.

Q Mr. Palmer, or excuse me, Mr. Deal, you understand that Mr. Palmer has pled guilty to the indictment; is that correct?

A Yes.

Q And those were three of the buys that you made from him?

A Yes.

Q And do you recall those buys that you worked with the police being May the 5th of 1998, May the 27th of 1998? Let me double-check by dates and June the 25th of 1998?

A Yes.

Q On each of those occasions, Mr. Deal, were you wearing a recording device?

A Yes.

Q And have you had an occasion to listen to the tape recordings that were made by you and your conversations with Mr. . . . .

* * *

[18] A Sell drugs for him and stuff like that.

Q And would this be crack cocaine?

A Yes.

Q On this date did you actually go to Branscomb's apartment there looking for Reginald Palmer?

A Yes, I did. He sent me around the corner to where he was.

Q Where was Mr. Palmer? Out on the street that day or what?

A Right on the street around the corner from Mr. Branscomb's, on Brady.

Q And then you met with Mr. Palmer on the 27th?

A Yes.

Q And you made a purchase from him that day?

A Yes, I did.

Q Did you have occasion on the 27th to see any additional amounts of crack cocaine?

A Yes.

Q And can you estimate for the court what you saw?

A I can't estimate, but it was quite a bit that he had.

Q Do you know whether it was as much as an ounce?

A Close to it.

Q Close to an ounce?

A Yes. It was quite a bit.

Q You said it was quite real?

* * *

[31] THE COURT: Your Honor, if I could have just a moment, please.

THE COURT: I have a question while you're checking. Do you know who hit you?

WITNESS: No, I do not.

THE COURT: You couldn't recognize them?

WITNESS: No. It was at nighttime.

THE COURT: Go ahead.

MS. MORRISSEY: Thank you, Your Honor. That's all I have.

THE COURT: Any cross examination?

CROSS EXAMINATION

QUESTIONS BY MR. ROOSEVELT:

Q Mr. Deal, when did your crack use begin?

A Maybe probably about 19.

Q How old are you now?

A 31.

Q So you have been using for 12 years?

A Yes.

Q And you were asked if you were addicted; is that correct? You are addicted to crack cocaine?

A Yes.

Q With what frequency would you use it?

A What do you mean?

Q How often would you use it?

* * *

[44] Q They wouldn't run him off or place him under arrest?

A No.

Q The times that he cooked crack in your apartment, can you estimate for the Court about how much it was on each of those occasions?

A It was a small amount. It wasn't much. I don't know how much it was, but it was a small amount.

Q Okay. Can you tell me — can you give us any idea, like was it less than an ounce, less than half an ounce, more than half an ounce, anything like that?

A Oh, it was less than a half an ounce, I know.

Q Less than half an ounce?

A Yes.

Q Was it as much as a quarter of an ounce?

A No, it wasn't.

Q You don't think it was?

A I'm sorry. I'm not sure.

Q All right. Were there occasions when Mr. Palmer would use your apartment to package crack cocaine?

A Just that one time that I was sitting in the living room talking to my oldest son, and he walked in with a couple of guys, and they started cutting it up. I told them they couldn't do that, that they had to leave. When they went outside, he gave this other guy a gun to shoot me with, and my older son stood in front of me, and that's the only reason he didn't, and . . . .

* * *

[53] A When I was about 22. I was in the service.

Q Have you used it since?

A Yes, I have.

Q How often?

A Every day.

Q You're how old now?

A I'm 50 years old now.

Q You've used it every day for nearly the last 30 years?

A No, just on and off.

Q What other drugs have you used?

A None.

Q Have you used crack cocaine?

A No. I haven't.

Q Used any form of cocaine?

A No.

Q The only drug you use is heroin?

A Yes.

Q In 1998, you used heroin?

A Yes.

Q What effect does it have on you when you use it?

A This is more a downer, like a sedative.

Q Were you using heroin during these times that you're describing talking with Money or Reginald Palmer in 1998 and 1999?

A No. Sometimes, but not all the time.

* * *

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[75] . . . which he was never formally charged, never tried and never found guilty of beyond a reasonable doubt. That's the whole concept of relevant conduct. Now, lawyers have made powerful arguments in all the courts, but the bottom line is the United States Supreme Court has said that this is constitutional, and if the Government can prove by a preponderance of the evidence certain relevant conduct, that is conduct that is substantially related to the offense charged, then it comes in at sentencing. What some people find even more peculiar, the rules of evidence are relaxed at sentencing, so all of the safeguards associated with the federal rules of evidence and common law evidence do not obtain. Of course, that's what we have here.

Given the state of the law and the evidence there is before the Court as to the defendant's objection on relevant conduct, it's overruled, and I adopt the probation officer's position. There's nothing particularly unreliable about Griffin's testimony. The fact of the matter is the Government's been using it for sometime. They have been overhearing him while he was in prison, and they knew what he was doing before he got out of prison. They had been following him, and for all we know, they're probably still using it.

There is a substantial, rational basis for attributing more than 150 grams to the defendant. Now, the Government has an exact 353.2 grams. I am not prepared to say that they are exactly correct, but I am prepared to say that there is [76] substantially more than 150 grams that must be attributed to the defendant under the evidence that is before me. That is what is important in this case.

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Now, the same thing on the firearm. I am not at liberty to ignore Mr. Branscomb's testimony. It could be said that, well, he's a heroin addict. Well, of course, everybody that testifies in these cases, it seems like, is under some type of disability or the other. Some of them do have a history of drug abuse, and most of them have done time in prison. I listened to them testify. It did not seem irrational. There was no particular motive for him to testify as he did, other than just telling the truth and wanting to get along with the Government, and hopefully keep Mr. Palmer off of his back. So I find that the defendant is good for the 2 points that come with the firearm. He's going to get it.

Now, finally, obstruction of justice. There's a lot of peculiar things about this case, and I'm not sure peculiar is the right word, but the fact of the matter is we got ready to have a trial. I was prepared to have a trial. As soon as the witness was called and the defendant saw he was going to plead, he immediately pled guilty.

Now, we have a young man, Mr. Deal, who comes in here, who is a cousin, and it's possible, this being East St. Louis, that it was just fortuitous that he was jumped and beaten to within an inch of his life Thursday, but it's not likely. . . .

* * * *

APPENDIX C — EXCERPTS FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS DATED JULY 24, 2000

[commencing at page 7]

STATEMENT OF REASONS

X The court adopts the factual findings and guideline application in the presentence report.

* * *

Guideline Range Determined by the Court:

Total Offense Level: 39

Criminal History Category: V

Imprisonment Range: 360-480 months

Supervised Release Range: 6 years

Fine Range: $20,000.00 to $9,000,000

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APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED SEPTEMBER 14, 2001

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

September 14, 2001

Before

Hon. Diane P. Wood, *Circuit Judge*

Hon. Terence T. Evans, *Circuit Judge*

Hon. Ann Claire Williams, *Circuit Judge*

No. 00-2945

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

REGINALD PALMER,

Defendant-Appellant.

Appendix D

Appeal from the United States District Court
for the Southern District of Illinois.

No. 99 CR 30228

G. Patrick Murphy,
Chief Judge.

ORDER

On April 10, 2001, the defendant-appellant filed a petition for rehearing. All the judges on the original panel have voted to deny a rehearing. The petition for rehearing is therefore DENIED.

APPENDIX E — EXCERPTS FROM RE-SENTENCING OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS DATED OCTOBER 29, 2001

IN THE DISTRICT OF THE UNITED STATES OF AMERICA
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Case No. 99-30228-GPM

UNITED STATES OF AMERICA,

Plaintiff,

VS.

REGINALD PALMER,

Defendant.

Re-Sentencing

BE IT REMEMBERED AND CERTIFIED that heretofore on **10/29/01**, the same being one of the regular judicial days in and for the United States District Court for the Southern District of Illinois, **HONORABLE *G. PATRICK MURPHY***, United States District Judge presiding, the following proceedings were recorded by mechanical stenography, transcript produced by computer.

* * *

Appendix E

[4] MRS. MORRISSEY: No, your Honor.

MR. ROOSEVELT: Yes, your Honor, if I may.

THE COURT: All right.

MR. ROOSEVELT: At whatever point the court — we I believe first, Judge, that the calculations of total offense level 37 with a range found of 324 to 405 months and a criminal history category of V is, as you read the Seventh Circuit's opinion, where they're directing the court to go. And so I think that is first off important to note. The defendant however, continues regarding, and if I may, continued the objection that reexpressed earlier at the original sentencing as to witnesses Deal and Branscomb. We had commented upon them at that time as they're simply not being credible. Mr. Branscomb, 30-year drug addict of heroin use who testified at sentencing that he really didn't say what drug amounts there were that were involved in these transactions. Mr. Deal subject to the same infirmities with the use of drugs, crack cocaine, for a substantial period of time. He could not estimate the amount on the May 27th 1998 transaction. In his testimony on May 5th 1998 said the amount purchased from Reggie was simply that he saw was simply the amount purchased, nothing more. On the June 23rd incident it was eight-tenth of a gram. On June 25 he bought a 16th of an ounce at Molly's hamburger or in that area. Testified regarding it. Attributed half to an ounce to Mr. Palmer. Yet at the same time this was argued [5] before at sentencing. Palmer had a taped statement of the transaction involved in which Deal asked Palmer what amount was there and Palmer says five grams. We think that is the best evidence was Palmer's statement of the amount.

And I had stated at the sentencing and restate our position that it was under 35 grams. The Seventh Circuit talked about a statement of counsel attributing 135 grams and the Seventh Circuit I think in their decision said it was somewhat mistified as to how that was come up with and, in fact, under 35 grams is the amount we had stated and do state here as part of our objection, your Honor, if we may.

Also on the specific offense characteristics, the original presentence report didn't make an adjustment under specific offense characteristics. That adjustment was made at the original sentencing for the use of a dangerous weapon. We objected then. We continue our objection. That is the specific offense characteristic addition of two levels does occur in the second addendum to the presentence report supplied to us this morning and it appears there. For that reason we make that objection.

And those who would be the nature and extent of our objections that we'd like the court to consider. Certainly the June 25th tape could be made available for review but their Palmer says, importantly I think that, estimates that weight to be way under what deal was ascribing to the defendant. Thank [6] you, your Honor.

THE COURT: Mr. Roosevelt, I appreciate your comments and I think they're serious. But the matter is before me on remand and I'm not in a position to review what the court of appeals has passed on. I've never been accused of being overly modest or particularly shy, but I don't think I've got a license to review the court of appeals. And it says here that, "we determine that the finding of more than

150 grams is clearly erroneous. The record, however, does support for relevant purposes a sentence within the range of 50 to 150 grams of crack." It's what they say. At re-sentencing no further proceedings would be necessary under re-sentencing. If the court elects to go beyond that, I mean, we have to do more. I've asked the U.S. attorney and she says no. So we're at 50 to 150. I appreciate what you're saying and I have to say I'm — you know, when it comes to what is and isn't reliable in these cases I'm still rather mystified.

I always give the example that we could take any of these people that were involved in this case, any one of them. If they came to your front door and said, I want to sell you a vacuum cleaner, they would be shot on sight because they're unreliable. Would anybody seriously say to Mr. Griffin or any of these other witnesses, well, just come on in. Let's have a cup of coffee. Maybe we could have a little ice tea and watch CNN. Well, of course, you wouldn't. You'd shoot 'em on sight. . . .

* * *

[10] . . . As I say, there is in a typical case — and this is only typical in that the record of everyone including the defendant is worse but that hardly stands out. It's almost prototypical in a crack cocaine case. And there's just — the personalities that are involved can hardly be said to be reliable at least in the sense that that's ordinarily understood. So I say that. And we do the best that we can with what we have.

The court of appeals finds that it's between 50 and 150 grams, that that's supported by the evidence, and that's as

good as what — as we're ever going to get. The court of appeals did not rely upon, or allow themselves to be misled, by what the defense lawyer said or the government's characterization of the evidence. It's apparent that they sat down and read the record in this case and they've come up with an order and that's that. So there's no particular problem there. The court sentenced the defendant at the high end because I thought that's what he ought to have, and I still do. This is — Mr. Palmer has a bad record. Anybody can read it and see what it says. I'm not going to go through it again. It wouldn't serve any purpose. I think I had it right the first time on what his record is.

And I wanna say this right up front. I don't believe that these sentences have what is called general deterrence. I don't think the people out there on the street give one wit whether Reginald Palmer got 300 months or 400 months. If we . . . .

* * * *